Taylor's treating doctor's report to the effect that it could not be said that it was necessary that Taylor separate from his wife to avoid the stress he was caused by his mother-in-law. The AAT found that Mr and Mrs Taylor lived apart because they were unable to continue in their relationship, and Taylor had chosen to remove himself from any stress caused by the marital relationship. The AAT was not satisfied that Taylor and his wife were unable to live together as a result of an illness or infirmity of either or both of them. Therefore, it decided that Taylor was not a member of an illness separated couple (as defined in s.4(7) of the *Social Security Act 1991*).

Formal decision

The AAT affirmed the decision under review.

[G.H.]

Splitting of family payment

McAULLEY (formerly O'DONNELL) and SECRETARY TO DSS (No. 11648)

Decided: 25 February 1997 by D.P. Breen.

The DSS had decided that McAulley had no entitlement to part of the family payment paid in respect of her son Michael because he was not her dependent child.

The facts

In October 1995 an order was made in the Family Court in which Michael's father, Neil O'Donnell was granted sole custody of Michael, with specified access being granted to McAulley.

In December 1995 McAulley claimed family payment for Michael on the basis that he was spending 7 days each fortnight with her. This request was refused and the decision was affirmed by an authorised review officer.

The SSAT varied the decision. It decided that McAulley should receive family payment during the December/ January school summer holiday period when she had continuous access to Michael.

Legislation and case law

The AAT referred to s.5(2) *Social Security Act 1991* which contains a definition of 'dependent child', and it also reviewed the case law. The cases considered included *Secretary, Department of Social Security v Field* (1989) 18 ALD 5 and *Elliot v Secretary, Department of Social Security* (1995) 40 ALD 594.

Reasons

The AAT accepted that the SSAT had made the correct decision in respect of the summer holidays. It referred to the fact that Michael's school also had three other school holiday periods each year in May, July and October in which he spent half the time with his mother. The AAT concluded that there should be a further splitting of the family payment on the basis that each parent qualified for 50% of family payment during all periods of school holidays.

Formal decision

The AAT varied the SSAT decision in accordance with the following findings:

- that McAulley and O'Donnell, not being members of the same couple, are each qualified for family payment for the dependent child Michael O'Donnell for the duration of the school holidays in the months of December/ January, May, July and October in each year and every year; and
- that they are equally so qualified.

[A.A.]

Practice and procedure: stay order

SHORT AND SHORT and SECRETARY TO THE DSS (No. 11575)

Decided: 29 January 1997 by G. Ettinger.

The Shorts applied to the AAT for an order staying the operation of the SSAT decision of 2 October 1996, which had affirmed the DSS decision to apply a preclusion period to 15 April 1997.

The facts

Mr Short received a compensation settlement on 15 December 1992, and was precluded from receiving a social security payment until 15 April 1997. The Shorts gave evidence that they 'had lost one house', and so their priority when they received the lump sum settlement, was to buy another family home. In spite of the fact that they knew they would have to repay some money to the DSS, the Shorts committed themselves to buying a new home. They had taken into account the preclusion period, but unexpected rises in building costs had resulted in a shortage of money.

The DSS argued that if the SSAT decision was stayed, and the Shorts were ultimately unsuccessful before the AAT, the DSS would not be able to recover the money paid to the Shorts because they would probably suffer financial hardship. It was also argued that the scale of expenditure of the Shorts had been unreasonable in the circumstances. The Shorts were still receiving some income. Mr Short was unable to work, but could assist with the care of their child. Mrs Short was an experienced waitress, but had not looked for work.

The merits

The AAT considered briefly the merits of the case and the meaning of 'special circumstances' in s.1184 of the *Social Security Act 1991*, and concluded that it was unlikely that special circumstances would be found in this case.

Formal decision

The AAT did not grant an Order staying the operation of the SSAT decision.

[C.H.]

DSP: meaning of 'treatment'

TLONAN and SECRETARY TO THE DSS (No. 11595)

Decided: 6 February 1997 by S.A. Forgie.

Tlonan sought a review of a decision of the SSAT which rejected her claim for the disability support pension (DSP). The claim had been rejected under s.94 of the *Social Security Act 1991* (the Act).

The issue

The issue before the AAT was whether Tlonan was qualified for a DSP, and in particular, whether Tlonan suffered from conditions which were diagnosed, investigated, treated and stabilised, and thus could be assigned an impairment rating under the Impairment Tables.

The evidence

The AAT heard evidence from both Tlonan and her husband. Tlonan gave evidence that she suffered from frequent migraine headaches, 5 times a day, and had done so for the past 7 years. Tlonan described the effects of the headaches to be pain at the back of her neck, top of her